NO. 82 5119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether the federal bank robbery statute 18 U.S.C. §2113(b) should be construed and interpreted broadly so as to include the crime of fraud by false pretenses for which Petitioner has been convicted?

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NELSON BELL,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, NELSON BELL, respectfully prays that a writ of certiroari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 1, 1982.

OPINION BELOW

The Court of Appeals entered its decision reversing Petitioner's conviction on March 23, 1981. A copy of the opinion is attached as Appendix "A."

The Court granted Respondent's Petition for rehearing and suggestion for rehearing en banc on September 4, 1981. A copy of the order is attached as Appendix "B."

The court entered its decision affirming Petitioner's conviction on June 1, 1982. A copy of the opinion is attached as Appendix "C."

JURISDICTION

On June 1, 1982, the Court of Appeals entered judgment affirming Petitioner's conviction (App C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On June 6, 1979, Petitioner was indicted for an alleged violation of 18 U.S.C. §2113(b) in that he allegedly did take and carry away with intent to steal and purloin, certain monies from Dade Federal Savings and Loan Association of Miami the deposits of which were insured by Federal Savings and Loan Insurance Corporation, said money belonging to and in the care, custody, control, management and possession of Dade Federal.

On November 20, 1979, subsequent to a two-day jury trial, the Petitioner was found guilty and was sentenced to one year imprisonment. A copy of the judgment is attached as Appendix "D."

On March 23, 1981, the Court of Appeals reversed the judgment of the District Court. United States v. Bell, 649 F.2d 281 (5th Cir. 1981) (App A). A rehearing en banc was granted and on June 1, 1982, the Court of Appeals affirmed Petitioner's conviction. United States v. Bell, 678 F.2d 547 (11th Cir., former 5th Cir., 1982) App C).

REASON FOR GRANTING THE WRIT

The federal bank robbery statute 18 U.S.C. §2113(b) should be construed and interpreted so as not to include the crime of fraud by false pretenses.

A conflict between the circuits has arisen as to the construction and interpretation of 18 U.S.C. §2113(b) which provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both...

The ambiguity contained in this provision centers around the terms "steal" and "purloin."

The Court below, based upon its decision in Thaggard v. United States 354 F.2d 735 (5th Cir. 1965), cert denied, 383 U.S. 958 (1966), broadly construed the statutes's ambiguous term "steal" as to embrace "all felonious takings...with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." Id. at 737 (quoting United States v. Turley, 352 U.S. 407) Having similarly relied on Turley, the Second Circuit United States v. Fistel, 460 F.2d 157, 162-3 (1972), Seventh Circuit United States v. Guiffre, 576 F.2d 126, 127-8, cert. denied, 439 U.S. 833 (1978), and the Eighth Circuit United States v. Johnson, 575 F.2d 678, 679-80 (1978) have held that a narrow construction of §2113(b) is not warranted. However, none of the above decisions have examined the legislative history of that enactment.

In analyzing the legislative history of 18 U.S.C. §2113(b), the Ninth Circuit in Le Masters v. United States, 378 F.2d 262, 267-8 (1967), not only concluded that a narrow construction was appropriate but also specifically held the crime of false pretenses beyond the statute's reach. In delving into congressional intent the Court stated:

> "...We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions. In 1937, ...Congress enacted §2113 clearly covering robbery and burglary, and including §2113(b), the provisions containing the ambiguous words 'steal' and 'purloin.' In construing the words we are obliged by the Turley case to give them a 'meaning consistent with the context in which (they) appear.' We think that that context, in the light of legislative history, requires that they be construed as not covering the obtaining of money by false pretenses..."

Having similarly relied extensively on the statute's legislative history, the Third Circuit United States v. Pinto, 646 F.2d 833, cert. denied, 102 S.Ct. 94 (1981), the Fourth Circuit United States v. Rogers, 289 F.2d 433 (1961), and the Sixth Circuit United States v. Feroni, 655 F.2d 707(1981) have adopted a narrower construction of § 2113(b).

The conflict between the circuits as to the proper construction and interpretation of 13 U.S.C. §2113(b) and the uncertainty created by it require resolution by this Court otherwise there will not be proper notice as to what is proscribed by law in violation of one's Fifth Amendment right of due process.

CONCLUSION

For the foregoing reasons, Petitioner, NELSON BELL, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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DATED: July 23, 1982

UNITED STATES of America, Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals, Fifth Circuit. Unit B

March 23, 1981.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal "Bank Robbery" statute, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that evidence was insufficient to prove that defendant had specific intent to steal at time he took and carried away $10,000 from bank.

Reversed.

Vance, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐568

To establish specific intent, Government must prove beyond reasonable doubt that defendant knowingly did act which law forbids purposely intending to violate the law.

2. Criminal Law ⇐552(3)

In circumstantial evidence cases, inferences to be drawn from evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.

3. Robbery ⇐24.2

Evidence was insufficient to prove that defendant, who possessed check under very suspicious circumstances and deposited it, had specific intent to steal at time he later withdrew amount of cash for which check was written, since jury might have perceived that defendant viewed theft as complete when he acquired check or when he deposited check and had it credited to his account; therefore, evidence was insufficient to support conviction under federal "Bank Robbery" statute. 18 U.S.C.A. § 2113(b).

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and VANCE, Circuit Judges.

TJOFLAT, Circuit Judge:

The appellant, Nelson Bell, was convicted under 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. He appeals his conviction, claiming that, as a matter of law, the evidence was inadequate to support the jury's finding that he took bank money and carried it away with the intent to steal or purloin. We reverse the conviction for insufficient evidence.

I

At the trial of Nelson Bell, the prosecution presented the following evidence. On October 13, 1978, Lawrence Rogovin, in Cincinnati, Ohio, wrote a check for $10,000 on his and his wife's Cincinnati bank account. He made the check payable to himself and his wife and endorsed it "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade

Federal Savings & Loan, Account No. 02-1-1-159976-0." On October 13 or 14, Elaine Rogovin mailed the check to an agent in Dade County, Florida, who was to deposit it in the Rogovins' account at the Dade Federal Savings & Loan (Dade Federal). The agent never received the check.

On October 17, Nelson Bell opened an account at the Alapattah Branch of Dade Federal. He used his own name, but a nonexistent home address and an incorrect date of birth and social security number. Later the same day, he went to another branch of Dade Federal and deposited a check for $10,000 into his new account, giving a second false home address. The check was the same check the Rogovins had mailed except that the account number noted in the endorsement had been scratched out and the defendant's new account number had been written in its place.

Dade Federal accepted the deposit and put a twenty-day hold on the check. Exactly twenty-one days later, on November 7, Bell returned to the Alapattah Branch and withdrew the total amount in the account, with interest, giving a third false home address. He insisted that the bank pay him in cash.

After the $10,000 check was discovered missing, FBI agents visited Nelson Bell at his place of work. Bell signed a written statement admitting that he had deposited the check and later withdrawn the money. He further stated that he received the check in the mail from someone in Cincinnati or Cleveland, Ohio, but that he did not have the letter and could not recall what it said or who sent it. In a subsequent interview, Bell stated that the $10,000 in cash had been stolen from his home in a burglary. A police officer who had investigated a burglary report at his home, however, testified that Bell had failed to report the theft of any money, and another officer testified that Bell specifically told him that no money had been taken and showed him several thousand dollars in a clutch bag.

A grand jury subsequently indicted Bell, charging him with violating 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. The jury found Bell guilty as charged. He appeals, alleging that the evidence was insufficient as a matter of law to sustain his conviction. Specifically, he contends that the government failed to prove that the $10,000 was withdrawn from the bank with the intent to steal or purloin.

II

The Bank Robbery statute, 18 U.S.C. § 2113(b) (1976), provides as follows:

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both ....

In *Thaggard v. United States*, 354 F.2d 735 (1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), this court, relying on *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), interpreted the term "stolen," as used in section 2113(b), to include "all felonious takings ... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Thaggard*, 354 F.2d at 737 (quoting *Turley*, 352 U.S. at 417, 77 S.Ct. at 402). This is not the type of case that

normally arises under this statute. *But see United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). While the facts may indicate that the defendant engaged in wrongdoing of some sort, the question we face is whether they indicate violation of section 2113(b).

There is little question that most of the necessary elements of the offense were met. The parties stipulated that Dade Federal was a federally insured savings and loan. Further, it appears clear that the amount in question exceeds $100 and either belonged to, or was in the care, custody, control, management, or possession of Dade Federal at the time defendant took and carried it away. The defendant contends, however, that the government failed to show that he took the money from Dade Federal with the specific intent to steal or purloin.

To begin, Bell contends that the evidence is insufficient to show that he took the check feloniously from its rightful owner, within the meaning of *Thaggard, supra*. While it is clear that he possessed the check under very suspicious circumstances, the government produced no specific evidence indicating how he got the check. If it cannot be proved that Bell stole the check, initially, it cannot be proved that he subsequently took the funds from the bank with the requisite intent to steal. We seriously question whether the evidence was sufficient on this point, but even assuming that it was, we find the evidence inadequate to prove that Bell had a specific intent to steal at the time he took and carried away the $10,000 from the bank.

[1] In *Prince v. United States*, 230 F.2d 568, 571 (5th Cir. 1956), *reversed on other grounds*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957), we specified that 18 U.S.C. § 2113(b) (1976) requires a showing of specific intent. One acts with specific intent when he "knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or to disregard the law ...." *Caples v. United States*, 391 F.2d 1018, 1022 (5th Cir. 1968). "To establish specific intent, the Government must prove beyond a reasonable doubt ... that [the] defendant knowingly did an act which the law forbids purposely intending to violate the law." *United States v. Thaggard*, 477 F.2d 626, 631 (5th Cir.) *cert. denied*, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973).[1]

By definition, one cannot intend to steal or purloin his own property.[2] Accordingly, if one deposits money with a bank believing that it belongs to him, he has no intent to steal it from the bank when he subsequently takes it back. For example, a defendant may steal cash

1. *See United States v. Bailey*, 444 U.S. 394, 403-07, 100 S.Ct. 624, 631-2, 62 L.Ed.2d 575 (1980) (one acts with specific intent if he consciously desires an illegal result, however likely it is that his conduct will actually cause an illegal result). *See also United States v. Haldeman*, 559 F.2d 31, 114 n. 226 (D.C.Cir.1976), *cert. denied sub nom. Mitchell v. United States*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States v. Thornton*, 498 F.2d 749, 751 (D.C.Cir.1974); *United States v. Smaldone*, 484 F.2d 311, 321 (10th Cir. 1973) *cert. denied*, 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed.2d 469 (1974); *United States v. Porter*, 431 F.2d 7, 9 (9th Cir.), *cert. denied*, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970); *United States v. Krosky*, 418 F.2d 65, 67 (6th Cir. 1969); *United States v. Williams*, 332 F.Supp. 1, 3 4 (D.Md. 1971).

2. *See Thaggard*, 354 F.2d at 737. *See also Black's Law Dictionary*, 1267 (5th ed. 1979) (stealing involves taking the property "of another").

from a third party, deposit it with a bank, and later withdraw it. He does not withdraw it with the intent to steal from the bank because he has already stolen the money from the third party; the theft is complete. In withdrawing the cash, the defendant views it as his own, at least vis-a-vis the bank.

If the defendant steals a check from the third party, rather than cash, deposits the check, and later withdraws the amount of cash for which the check was written, the considerations are more complex. For instance, one could view this case as similar to that in the preceding paragraph--the theft is complete when the defendant takes the check, so that in defendant's subsequent dealings with the bank he views the money as his own. On the other hand, one might speculate that the defendant, in invoking the bank processes to convert the check to cash, has an ongoing or new intent to steal the cash the check represents. In the latter case, when does defendant view the crime as complete and thus cease to have the requisite specific intent? When defendant's bank accepts his deposit of the check? When the payor bank honors the check and forwards payment to defendant's bank? When the twenty-day holding period expires, indicating that the defendant now has free use of the amount deposited? In short, the jury in such a case must determine whether the defendant *intended to commit an illegal act by withdrawing the money from the bank.*

[2, 3] In the case at hand, to prove Bell guilty of violating section 2113(b), the government had to prove that he intended to steal the $10,000 through the act of closing out his account with Dade Federal.[3] The only evidence the jury received concerning Bell's specific intent, however, was that he obtained the check under suspicious circumstances; he gave his proper name but a false social security number, date of birth, and address in his dealings with Dade Federal; he transacted his business at two different branches of Dade Federal; his deposit was subject to a twenty-day holding period, and he withdrew the $10,000, in cash, one day after that period expired. This evidence is all circumstantial. "[I]n circumstantial evidence cases the inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence." *United States v. Casey*, 428 F.2d 229, 231 (5th Cir.), *cert. denied*, 400 U.S. 839, 91 S.Ct. 78, 27 L.Ed.2d 73 (1970) (quoting *Montoya v. United States*, 402 F.2d 847, 850 (5th Cir. 1968)). *See United States v. Lange*, 528 F.2d 1280, 1287–8 (5th Cir. 1976); *O'Brien v. United States*, 411 F.2d 522, 524–5 (5th Cir. 1969). Here, even when the evidence is viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), it cannot be said to be inconsistent with every reasonable hypothesis that the defendant lacked the requisite intent to steal or purloin from the bank in withdrawing the $10,000 from his checking account. The jury might have perceived that Bell viewed the theft as complete when he acquired the check and that he

3. In his dissent, Judge Vance relies upon *United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978), in which the Seventh Circuit affirmed the conviction under section 2113(b) of a defendant who deposited stolen, forged checks and later withdrew the money. As Judge Vance acknowledges, however, the Seventh Circuit did not consider the question of specific intent, and there is no indication that the question was raised. Accordingly, we find that case inapposite.

gave false information to the bank only to cover his tracks. It also could have inferred that Bell viewed the theft as complete when he deposited the check and had it credited to his account. In either event Bell would have lacked the requisite specific intent to steal or purloin when he removed the money from his checking account.[4] Accordingly, the conviction must be

REVERSED.

VANCE, Circuit Judge, dissenting:

Through use of a stolen check with an altered endorsement, Bell succeeded in inducing a federally insured savings and loan association to part with possession of ten thousand dollars that did not belong to him. This court in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), upheld a conviction under 18 U.S.C. § 2113(b) of a defendant who withdrew money that he knew his bank had mistakenly credited to his account. I am of the opinion that *Thaggard* is controlling. In *Thaggard*, we expressly rejected the view of the fourth circuit in *United States v. Rogers*, 289 F.2d 433, 437 (4th Cir. 1961), and held that section 2113(b) is not to be so narrowly construed that its applicability is limited only to larceny as that crime was known to the common law. The second and seventh circuits also have adopted this view. *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). These decisions rely on the Supreme Court's interpretation of the word "stolen" in *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957) as a basis for broadly interpreting section 2113(b) to apply to felonious takings with intent to deprive the owner of rights and benefits of ownership. In *Guiffre* the seventh circuit upheld the conviction under section 2113(b) of a defendant who deposited stolen checks with forged endorsements into three separate accounts and later withdrew the money. Although the court did not discuss the requisite intent required for a conviction when a defendant deposits a stolen check with an alteration and later withdraws the money, it affirmed the conviction of a defendant charged by the indictment with "taking and carrying away with the intent to steal." The court did not require testimony concerning the law of negotiable instruments.

The evidence here provided sufficient basis for the jury's conclusion that Bell violated section 2113(b). To my mind Bell's actions in establishing an account with a nonexistent home address and incorrect date of birth and social security number provide ample evidence of specif-

4. In this case the jury needed a framework in which to evaluate Bell's acts and the alternative views he may have held about their ramifications. This framework might have been provided through expert testimony or other evidence and instructions concerning the technicalities of the banking process, debtor-creditor rights, and the law of negotiable instruments. Such matters are foreign to the typical juror, but yet they may be very useful in exploring and evaluating the question of subjective intent. *See United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

Of course, evidence that a defendant's withdrawal injured the bank—for instance, evidence that under state law the bank was liable to the payor of the check for the amount that the defendant withdrew—would not, in itself, be sufficient evidence of specific intent to steal from the bank. Unlike the law of "general intent," which holds simply that one "intends" the "natural consequences of his acts," *Windisch v. United States*, 295 F.2d 531, 532 (5th Cir. 1961), specific intent involves a subjective element. The defendant must actually intend the illegal result. *See Caples*, 391 F.2d at 1022.

649 F.2d 382-3

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 4, 1981.

Appeal from the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1981, 5 Cir., 1981, 649 F.2d 281).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc *with oral* argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals,
Fifth Circuit.*

Unit B

June 1, 1982.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal bank robbery statute, and he appealed. The Court of Appeals, 649 F.2d 281, reversed by a divided panel. On rehearing en banc, the Court of Appeals, Vance, Circuit Judge, held that evidence that defendant altered the endorsement on a check, deposited it into his account, and thereby was enabled to take and did take a sum of money with intent to steal from the care, custody, control, management or possession of a federally insured savings and loan association was sufficient to sustain his conviction.

Affirmed.

Tjoflat, Circuit Judge, filed dissenting opinion in which Godbold, Chief Judge, and Hatchett and Clark, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, filed specially concurring opinion in which Roney and Clark, Circuit Judges, joined.

1. Robbery ⇐5

Term "steal" as used in federal bank robbery statute embraces all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny. 18 U.S.C.A. § 2113(b).

2. Robbery ⇐5

Federal bank robbery statute could reach conduct which involved taking by means of deceit or false pretenses. 18 U.S.C.A. § 2113(b).

3. Criminal Law ⇐552(3)

In order to be sufficient to support a conviction, it is not necessary that the evidence excludes every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.

4. Robbery ⇐24.1(1)

Evidence that defendant altered the endorsement on a check, deposited it to his account and thereby was enabled to take and did take a sum of money with intent to steal from the care, custody, control, management or possession of a federally insured savings and loan association was sufficient to sustain his conviction under the federal bank robbery statute. 18 U.S.C.A. § 2113(b).

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

VANCE, Circuit Judge:

Nelson Bell was convicted under 18 U.S.C. § 2113(b) and sentenced to imprisonment for one year. He appealed, contending that the evidence was insufficient to support the jury finding that he took or carried away money from a savings and loan association with the intent to steal or purloin. A divided panel of this court re-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

versed. *United States v. Bell*, 649 F.2d 281 (5th Cir. 1981). Sitting en banc we now affirm Bell's conviction.

On October 13, 1978 Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio to their investment agent in Miami, Florida. The check was made payable to the Rogovins, and had the following limited endorsement on the back: "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings & Loan, Account No. 02-1-159976-0." The agent never received the check.

On October 17 Nelson Bell opened an account at a branch of Dade Federal and was assigned account number 03-1-081526-6. He used his own name, but gave a false address, birth date and social security number. Later that day he deposited the Rogovins' check to account number 03-1-081526-6 at another branch of Dade Federal. The evidence does not show how Bell, who was unknown to the Rogovins, obtained the check. It does show, however, that he was not authorized to deposit or cash the Rogovins' check. At the time of deposit the original account number in the endorsement had been scratched out and Bell's new account number had been added. Dade Federal inexplicably accepted the obviously altered check, guaranteed the endorsement and processed it for payment. After a twenty day holding period the check had cleared. The amount of the deposited check, which had been credited to Bell's account, then became available for withdrawal. On the twenty-first day, before the Rogovins discovered the loss of the check, Bell withdrew the $10,000 in cash and closed the account.

Bell was convicted under the federal bank robbery statute, 18 U.S.C. § 2113(b), which provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

[1, 2] Bell contends that the taking of the $10,000 was not within the statute because it did not constitute common law larceny, a specific intent crime requiring a trespassory taking. The question whether a nontrespassory taking is within the federal statute was treated at some length in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966). We reaffirm this court's conclusion in *Thaggard* that the term "steal," as used in 18 U.S.C. § 2113(b), embraces "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 737 (quoting *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402, 1 L.Ed.2d 430 (1957)).[1]

1. *See United States v. Ferraro*, 414 F.2d 802, 804 (5th Cir. 1969); *Williams v. United States*, 402 F.2d 258, 259 (5th Cir. 1968). The second, seventh and eighth circuits have similarly relied on *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), in deciding that a narrow construction of section 2113(b) is not warranted. *See United States v. Guiffre*, 576 F.2d 126, 127-28 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978); *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *United States v. Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972); *cf. United States v. Maloney*, 607 F.2d 222, 229-30 & n.12 (9th Cir. 1979) (crimes under 18 U.S.C. § 1153 not limited to common law larceny), *cert. denied* 445 U.S. 918, 100 S.Ct. 1280, 63 L.Ed.2d 603 (1980); *United States v. Bryan*, 483 F.2d 88, 91 & n.1 (3d Cir. 1973) (crimes under 18 U.S.C. § 659 not limited to common law larce-

Bell's conduct, which involved taking by means of deceit or false pretenses, can therefore be reached by the federal bank robbery statute.

Bell also argues that the evidence is insufficient to support his conviction unless it excludes every reasonable hypothesis of innocence, on the theory that if there is such a reasonable hypothesis the jury must necessarily have had a reasonable doubt of his guilt. Specifically, he alleges that since the jury could reasonably have found that he believed that his crime was completed before he withdrew the $10,000, the jury must have had a reasonable doubt of his specific intent to steal from Dade Federal. He additionally contends that the proof was insufficient to establish that he altered the endorsement on the Rogovins' check.[2]

[3, 4] We hold that the appellant has incorrectly stated the standard of review for sufficiency of the evidence. It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.[3] A jury is free to choose among reasonable constructions of the evidence. Viewing the evidence presented in this case and the inferences that may be drawn from

ny). *But see United States v. Feroni*, 655 F.2d 707, 709–11 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836–37 (3d Cir.), *cert. denied*, — U.S. ——, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262, 263–68 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437–38 (4th Cir. 1961).

2. Appellant does not dispute that he took and carried away over $100 that belonged to or was in the care, custody, control, management or possession of Dade Federal, which the parties stipulated to be a federally insured savings and loan association.

3. The fifth circuit at one time took the position that the government had a heavier burden of proof when relying on circumstantial evidence of a crime than when relying on direct evidence. Under that view, the district court was required to grant an acquittal unless the circumstantial evidence was "inconsistent with every reasonable hypothesis of innocence." *E.g., Kassin v. United States*, 87 F.2d 183, 184 (5th Cir. 1937). In 1954 the Supreme Court stated that circumstantial evidence was not intrinsically different from testimonial evidence, and described the every reasonable hypothesis jury instruction as "confusing and incorrect." *Holland v. United States*, 348 U.S. 121, 139–40, 75 S.Ct. 127, 137–38, 99 L.Ed. 150 (1954). Despite the Supreme Court's criticism the fifth circuit did not abandon the hypothesis of innocence language, but attempted to reconcile it with *Holland* by rephrasing the test. *See United States v. Squella-Avendano*, 478 F.2d 433, 437 (5th Cir. 1973); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971); *Riggs v. United States*, 280 F.2d 949, 954–55 (5th Cir. 1960); *Cuthbert v. United States*, 278 F.2d 220, 224–25 (5th Cir. 1960). All of the other circuits have abandoned the hypothesis of innocence phraseology. *See United States v. Davis*, 562 F.2d 681, 689 & n.10 (D.C.Cir.1977); *United States v. Gabriner*, 571 F.2d 48, 50 (1st Cir. 1978); *United States v. Elsbery*, 602 F.2d 1054, 1057 (2d Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979); *United States v. Fiore*, 467 F.2d 86, 88 (2d Cir. 1972), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973); *United States v. Hamilton*, 457 F.2d 95, 98 (3d Cir. 1972); *United States v. Chappell*, 353 F.2d 83, 84 (4th Cir. 1965); *United States v. Conti*, 339 F.2d 10, 12–13 (6th Cir. 1964); *United States v. Wigoda*, 521 F.2d 1221, 1225 (7th Cir. 1975), *cert. denied*, 424 U.S. 949, 96 S.Ct. 1421, 47 L.Ed.2d 355 (1976); *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977); *United States v. Nelson*, 419 F.2d 1237, 1242–45 & nn. 18 & 19 (9th Cir. 1969); *United States v. Merrick*, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023, 93 S.Ct. 462, 34 L.Ed.2d 314 (1972). We conclude that the difference is not merely semantic, and specifically adopt, as the more precise statement of the law, the test as set out in the text above.

it in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that it was sufficient to allow a reasonable jury to find that Bell altered the endorsement on the check, deposited it to his account, and thereby was enabled to take and did take $10,000 with intent to steal from the care, custody, control, management or possession of Dade Federal.

AFFIRMED.

TJOFLAT, Circuit Judge, joined by GODBOLD, Chief Judge, HATCHETT and THOMAS A. CLARK, Circuit Judges, dissenting:

There is little question that Nelson Bell engaged in some form of criminal activity: Bell wrongfully obtained $10,000 that belonged to another. The issue, however, is not whether Bell committed a crime, but whether his conduct was proscribed by the federal bank robbery statute, 18 U.S.C. § 2113(b) (1976). Because I believe that it was not, I respectfully dissent.

The majority asserts that Bell's presentation of the altered check to Dade Federal for credit to his account and his subsequent withdrawal of the funds represented by that check amounted to the crime of fraud by false pretenses and that this activity violated section 2113(b). Assuming, *arguendo*, that Bell committed fraud by false pretenses,[1] I take issue with the majority over whether the federal bank robbery statute should be interpreted to proscribe that crime.

That statute provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. ...

18 U.S.C. § 2113(b) (1976).

There can be no doubt that this provision is ambiguous. "[T]hroughout our jurisprudence, the courts have considered that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. McClain*, 545 F.2d

1. Although the majority finds, and my analysis assumes, sufficient evidence that Bell committed fraud by false pretenses against Dade Federal, I have serious doubts whether this is actually the case. The elements of common law false pretenses are a false representation of fact, scienter, intent to induce action in reliance on the misrepresentation, justifiable reliance by the party fraudulently induced, and *loss* to that party resulting from such reliance. *Prosser, Law of Torts*, § 105 at 685–86 (4th ed. 1972); *see generally Torcia, Wharton's Criminal Law*, §§ 422–452 (14th ed. 1980). There is no evidence in this case that Dade Federal suffered any loss as a result of Bell's activities. The evidence showed that Bell presented the altered check to Dade Federal for deposit to his account. Dade Federal did not immediately credit Bell's account however, instead it waited until the check had been paid by the drawee bank in Cincinnati. According to the evidence then, when Bell withdrew the $10,000 from his Dade Federal account he in essence withdrew funds that had been provided Dade Federal by the Cincinnati bank. There was no proof that Dade Federal was ever called upon by the Cincinnati bank to absorb that bank's loss, or that of the maker, and the trial judge's instructions did not speak to that issue. Therefore, we have a case in which the government failed to prove that the alleged victim of fraud by false pretenses, Dade Federal, suffered any loss.

The government's proof established nothing more than that Dade Federal was a conduit through which Bell was enabled to appropriate the funds of another. Therefore, even if § 2113(b) could be read to prohibit fraud by false pretenses, the evidence presented in this case was insufficient to convict Bell.

988, 995 (5th Cir. 1977), *quoting Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals." *United States v. Boston and Maine R.R.*, 380 U.S. 157, 160, 85 S.Ct. 868, 870, 13 L.Ed.2d 728 (1965), *quoting United States v. Wiltberger*, 5 Wheat. (18 U.S.) 76, 5 L.Ed. 37 (1820). "Of course, the doctrine of strict construction is not absolute. '[T]he intention of the law-maker must govern in the construction of penal ... statutes.'" *McClain*, 545 F.2d at 996 (citations omitted).

Applying these principles, the Court of Appeals for the Ninth Circuit analyzed the legislative history of section 2113(b), and not only concluded that a narrow construction of that provision was appropriate, but also specifically held the crime of false pretenses beyond the statute's reach. *LeMasters v. United States*, 378 F.2d 262, 267–68 (9th Cir. 1967). I can do no better than recite the Ninth Circuit's painstaking parsing of congressional intent:

> The 1937 enactment of 18 U.S.Code § 2113(b) had a background and legislative history wholly different from those of the 1919 stolen motor vehicle act. *We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions.* In 1937, without any further discussion of evil to be cured, Congress enacted § 2113 clearly covering robbery and burglary, and including § 2113(b), the provision containing the ambiguous words "steal" and "purloin." In construing the words we are obliged by the Turley case to give them a "meaning consistent with the context in which [they] appear." *We think that that context, in the light of legislative history, requires that they be construed as not covering the obtaining of money by false pretenses.* The words are used in conjunction with the words "takes and carries away," and these are the classic words used to define larceny. The words do not have a necessary common law meaning; rather, they are ambiguous. They are used in a statute, the purpose of which, as stated in its title, is "* * * to include larceny." In such a case, the title is "a useful aid in resolving ambiguilty [sic]. ..."
>
> In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. *Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank of [sic] federal crime, that such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law.* None of the reasons which persuaded the circuits and finally the Supreme Court to interpret broadly the word stolen in the motor vehicle act were present in 1937, when Congress wrote § 2113, or are present today.

If the oft cited canon of statutory construction that ambiguities in penal statutes are to be resolved in favor of the accused has any vitality, this is a plain case for its application.

Id. (citations omitted) (emphasis supplied). *See Jerome v. United States*, 318 U.S. 101, 105–6, 63 S.Ct. 483, 486, 87 L.Ed. 640 (1943); *United States v. Feroni*, 655 F.2d 707, 710–711 (6th Cir. 1981).

I find this analysis of congressional intent very persuasive. The resolution of the ambiguity which section 2113(b) manifests is significantly aided by the legislative history which shows that Congress expressly considered, but rejected, the inclusion of fraud by false pretenses within the statute's purview.[2] I am also cognizant of the precept of strict construction of criminal statutes and of the Supreme Court's directive that federal courts "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. at 104, 63 S.Ct. at 485 (interpreting earlier version of federal bank robbery statute). Given all of this, I would hold that section 2113(b) does not encompass conduct which amounts only to fraud by false pretenses. *Accord, United States v. Feroni*, 655 F.2d 707 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967).

I disagree with the majority that *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), controls this case. In *Thaggard*, the defendant drew money from his bank account when he knew that the bank had mistakenly overcredited that account. Thus, the common law equivalent of Thaggard's activity was more in the nature of *conversion*, rather than false pretenses. Moreover, the bank in *Thaggard*, unlike Dade Federal in this case, suffered a tangible loss. See note 1, *supra*. Finally, the majority's reading of *Thaggard* as holding that section 2113(b) embraces "all felonious takings" is erroneous: that language in *Thaggard* is plainly dicta, not at all necessary to the result. The majority's use of *Thaggard* to extend section 2113(b)'s reach to include fraud by false pretenses is, therefore, misguided, especially in light of the legislative history and rules of construction I have discussed.

I have no quarrel with the majority's adoption of a test for sufficiency of the evidence which inquires whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." Majority opinion at slip op. p. 15227, pp. ———. The application of this test does not change my analysis of this case or the conclusions I have reached, however, for even if there were overwhelming evidence that Bell subjected Dade Federal to the crime of fraud by false

2. Notably, none of the decisions which "broadly construe[] § 2113(b) [see majority opinion, note 1, *supra*] examines the legislative history of that enactment. Each of those decisions is nothing more than a mechanical application of [*United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957)]. They provide no discussion of why the context of § 2113(b) suggests that a broad interpretation of its provisions is appropriate." *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981). Conversely, the courts that have adopted a narrower construction of § 2113(b) have relied extensively on the statute's legislative history. *See Feroni, supra; United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437–38 (4th Cir. 1961).

pretenses, I would nevertheless hold that a section 2113(b) prosecution could not lie.

I respectfully dissent.

R. LANIER ANDERSON, III, Circuit Judge, joined by RONEY and THOMAS A. CLARK, Circuit Judges, specially concurring:

I concur in the opinion, and I write separately only to state my understanding that Judge Vance's opinion does not change the substantive law of this circuit with respect to the standard of review for sufficiency of the evidence. To say that the evidence is sufficient if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt," *supra* Slip op. at 15227, at ——, is not substantively different from saying that the evidence is sufficient if a reasonable trier of fact could find that the "evidence was inconsistent with every reasonable hypothesis of innocence." *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981). It is true that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt," *supra* Slip op. at 15227, at ——, but it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt.

United States of America vs.

DEFENDANT: NELSON BELL

MICROFILMED

DEC 20 1979

JOSEPH P. BOGART
CLERK, U.S. DIST. CT.

United States District Court

THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 79-220-CR-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: December DAY: 18 YE: 197

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Frederico A. Moreno, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual bas's for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of taking and stealing certain monie from Dade Federal Savings and Loan Association of Miami; in violatic of Title 18, USC, Section 2113(b); as charged in the One Count Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the con was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defend hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1 YEAR, or until otherwise discharged by due process of law.

FILED

DEC 18 1979

JAMES L. KNIGHT
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out o reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, a any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and re probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deli a certified copy of this judgm and commitment to the U.S. M shal or other qualified officer.

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SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

SIDNEY M. ARONOVITZ

Date December 18, 1979

"Appendix D"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO._____

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF FLORIDA)
COUNTY OF BROWARD) SS

ROY W. ALLMAN, after being duly sworn, deposes and says that pursuant to Rule 28.4 (a) of this Court he served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States Mails at Fort Lauderdale, Florida, on 23rd day of July, 1982.

ROY W. ALLMAN, Affiant

SUBSCRIBED AND SWORN to before me this 23d day of July, 1982.

Notary Public

NOTARY PUBLIC
STATE OF FLORIDA
MY COMMISSION EXPIRES
APRIL 15 1985
BONDED THRU GEN. INS. UND.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5119

NELSON BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, ROY W. ALLMAN, Attorney for Petitioner, pursuant to Supreme Court Rule 46 and moves this Honorable Court to appoint him as counsel for Petitioner and in support thereof would state the following:

1. The motion of Petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari were granted Novmeber 29, 1982.

2. Applicant has represented Petitioner in the Court of Appeals below and, as a result is extremely familiar with Petitioner's case.

3. Petitioner has expressed a strong desire that applicant continue to represent him in the proceedings before this Honorable Court and applicant so desires to continue said representation.

4. Applicant is a sole practitioner who has graduated from Cumberland School of Law, Samford University, 1970.

5. Applicant has been an active, practicing attorney in the State of Florida for the past twelve (12) years and is a member in good standing of the Florida Bar.

6. Applicant has been admitted to practice before all State Courts of Florida and all Federal Courts, including the United States Supreme Court.

7. Applicant has actually appeared before the following courts:

(a) State Trial courts;

(b) Courts of Appeals (3rd and 4th Circuits); and

(c) Federal District Trial Courts.

8. Applicant's experience with Appellate practice includes:

(a) Presented three (3) oral arguments;

(b) Had written four (4) or five (5) appellate briefs; and

(c) Supervised other attorneys.

WHEREFORE, the Applicant, ROY W. ALLMAN, respectfully requests that this Honorable Court appoint him Counsel for Petitioner.

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 27th day of December, 1982, to: REX E. LEE, Solicitor General, Department of Justice, Washington, D.C. 20503.

LAW OFFICE OR ROY W. ALLMAN, P.A.
208 S. E. Sixth Street
Fort Lauderdale, FL 33301
(305) 467-9669

Roy W Allman (me)
ROY W. ALLMAN
Attorney for Petitioner